

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs on November 16, 2001

ALVIN MCNAIR v. CARLTON E. SMITH

**Direct Appeal from the Chancery Court for Knox County
No. 97807-1 Hon. John F. Weaver, Chancellor**

FILED JANUARY 28, 2002

No. E2000-02980-COA-R3-CV

The Trial Court entered Judgment finding a constructive trust and establishing its value on any interest defendant had in the property. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

HERSCHEL PICKENS FRANKS, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Carlton E. Smith, Pikeville, Tennessee, Appellant, *pro se*.

Gary M. Kirk, Knoxville, Tennessee, for Appellee, Alvin McNair.

OPINION

This is the second appeal of this action involving the granting of a constructive trust. The case has endured a convoluted and tortious journey through the court system, and the first appeal resulted in this Court remanding the case on April 15, 1999, wherein we vacated the Trial Court's Judgment and ordered "a full consideration of the merits." Defendant has attempted to raise a myriad of issues throughout all stages of the proceeding. Essentially, they are inappropriate, both procedurally and substantively.

The focus of this appeal by the defendant is whether our prior remand for a trial on the merits has been satisfied.

Pro se litigants are entitled to fair and equal treatment, but may not shift the burden of litigating their case to the courts. See *Irvin v. City of Clarksville*, 767 S.W.2d 649, 653 (Tenn. Ct. App. 1988); *Paehler v. Union Planters Nat'l Bank, Inc.*, 971 S.W.2d 393, 397 (Tenn. Ct. App. 1997); *McReynolds v. Cherokee Ins. Co.*, 815 S.W.2d 208, 211 (Tenn. Ct. App. 1991). Following remand, the Trial Court on November 16, 1999 granted defendant a continuance, and then on February 2, 2000, plaintiff filed a Motion for Default. On March 20, the Trial Court again entered an Order continuing the case, and directed the defendant to respond by April 3, 2000. On April 13, 2000, defendant filed a document entitled "Declaration in Opposition to Plaintiff's Motion for a Declaratory Judgment", along with a statement of disputed issues and defendant's own affidavit. On June 6, 2000, the defendant filed an answer styled "Defendant's Answer to Plaintiff's Amendment to Petition for Declaratory Judgment".

On June 14, the Court entered Judgment in favor of the plaintiff, following an evidentiary hearing. The Judgment recites that the hearing was held "in the absence of the defendant", and the Judgment reiterated the propriety of a constructive trust on the property and established its value. The Judgment was entered on July 7, and defendant filed a Petition for Rehearing and/or to Alter or Amend Judgment on July 20, 2000. That Petition essentially argues the merits of the Court's action. On October 9, 2000, the Court overruled defendant's "Petition for Rehearing and/or to Alter or Amend Judgment". In that Order, the Court observed:

This twelve (12) year old case came on before this Court on the 14th day of June, 2000, pursuant to the OPINION of the Court of Appeals filed August 15, 1999 vacating the Judgment entered by Chancellor Frederick D. McDonald on June 1, 1989, and remanding "the case for trial on the merits." Subsequent to the remand, the defendant has made several appearances in the case, including his filing on June 6 of a document entitled "DEFENDANT'S ANSWER TO PLAINTIFF'S AMENDED PETITION FOR DECLARATORY JUDGMENT," thereby waiving under Rule 12.02 of the Tennessee Rules of Civil Procedure any defense relating to service of process. (On one occasion after remand, the defendant appeared in open court, having been released from incarceration. However, he has returned to prison). Pursuant to the remand of the Court of Appeals, the matter was set for trial on June 14, 2000. The defendant neither filed a motion for a continuance of the trial on July 14, 2000, [sic] nor a motion to hold the proceeding in abeyance pending his release from incarceration. However, the defendant had filed previous motions for continuance or extensions of time which were granted by this Court.

As the defendant's appeal relates to the merits of the proceeding before the Chancellor, no transcript of evidence has been presented to the Court and in the absence of filing a record of the evidence heard by the Trial Court, we must conclusively presume that the Judgment is supported by the evidence.

As to defendant's procedural complaints that he was not properly before the Court when the Judgment was rendered, the record demonstrates that the Order entered on November 16, 1999 granting defendant an extension, recites "... argument [was made] by counsel for the plaintiff

and by the defendant.” Defendant also filed a Motion for a Continuance, as noted on March 13, but it was not until the document entitled “Declaration in Opposition to Plaintiff’s Motion for Declaratory Judgment” did the defendant mention any invalidity of the initial service of process. Also, defendant’s Answer subsequently filed does not raise the issue. We hold that the defendant’s filing motions without raising this issue, and his personal appearance in court, waived the defense that the Court lacks jurisdiction over the defendant. *See* Rule 12.08, Rules of Civil Procedure.

We find the appeal to be without merit and remand, with the cost of the appeal assessed to Carlton E. Smith.

HERSCHEL PICKENS FRANKS, J.